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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/663,487	09/16/2003	Joseph P. Errico	F-293	2429
530	7590	11/03/2006	EXAMINER	
LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090			PELLEGRINO, BRIAN E	
			ART UNIT	PAPER NUMBER
			3738	

DATE MAILED: 11/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/663,487	ERRICO ET AL.	
	Examiner	Art Unit	
	Brian E. Pellegrino	3738	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 August 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

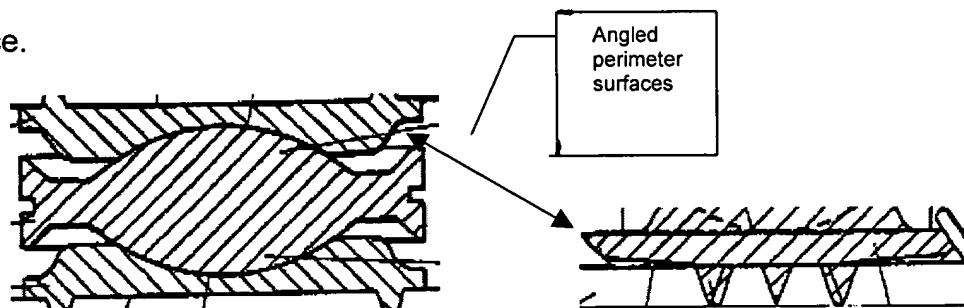
Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION***Claim Rejections - 35 USC § 102***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1,2,19 are rejected under 35 U.S.C. 102(b) as being anticipated by Keller (4997432). Fig. 1 shows a spinal device with first and second baseplates 3 that are articulatable relative to one another and have angled perimeters that slope downward into the plate surface. Fig. 3 shows a manipulation tool that has an *angled distal end* with jaws being angled (Fig. 2) to correspond to the angled perimeter of the baseplates. It can also be seen (Figs. 1 & 5) that the angled perimeter of the baseplates has flat ledges that flank a central flat sloping surface.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 3-18,20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Keller '432 in view of McGahan et al. (WO 01/62191). Keller is explained supra. However, Keller fails to disclose the baseplates having three flat perimeter surfaces with two of the perimeter surfaces forming corners.

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McGahan et al. illustrates (Fig. 15b) a spinal orthopedic set with a spinal implant **10** with angled perimeter surfaces having a central flat surface **22** flanked by two flat corner perimeter surfaces **18, 26** that correspond to the angled distal end of the tool having central surface **128** and two flanked flat surfaces **126, 130** to engage the implant. McGahan teaches that angled perimeter flat surfaces are provided to prevent rotation of the implant when inserting with the tool, page 12, lines 21-24. Regarding claims 9,10,17,18 please note the intended use as set forth in the claims carries no weight in the absence of any distinguishing structure. It would have been obvious to one of ordinary skill in the art to utilize angled flat perimeter surfaces on the plates and tool as taught McGahan and modify the spinal implant and tool set of Keller such that it provides the surgeon with more precise control of the spinal implant as the device is implanted. A modification of the shape or engaging structure of the tool and that of the spinal implant would be within the skill of one of ordinary skill in the art since it would not change the ability of the device's baseplates from articulating with respect to one another.

Response to Arguments

Applicant's arguments filed 8/14/06 have been fully considered but they are not persuasive. Applicant argues that Keller fails to show side angled baseplates. However, as illustrated above and mentioned in the rejection Keller clearly does show side angled perimeter surfaces on the baseplates that are angled. Applicant also argues that the baseplates of Keller's implant are curved.

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However, the curved portion that Applicant is referring to in Keller's implant is the central portion of the spinal implant and not the baseplates. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In this instance, McGahan's patent is used for the teaching of providing multiple angle surface on the implant and tool. Applicant misconstrued the rejection because there is no need to modify the type of implant Keller discloses, but only the shape. Keller clearly discloses a spinal implant that articulates as claimed and the Examiner was not suggesting to modify the type of spinal implant taught by McGahan, but only utilize the teaching McGahan provided in that the multi-angled perimeter surfaces provide stabilization during implantation. McGahan provides motivation (p.12, lines 21,22) to modify Keller's baseplate surfaces such that the angled surfaces prevent rotation. This is important because during implantation or insertion, the implant should be fixed.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory

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period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on Monday-Thursday from 7:30am to 5pm. The examiner can also be reached on alternate Fridays. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott, can be reached at 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

TC 3700, AU 3738

BRIAN E. PELLEGRINO
PRIMARY EXAMINER